Casa Tenaga Sdn Bhd v Efektik Sempurna Sdn Bhd & Anor

HIGH COURT (SHAH ALAM) — SUIT NO 22C-12–05 OF 2014
SEE MEE CHUN J
4 JUNE 2015

Contract — Building contract — M&E fittings — Whether plaintiff had proven its claim — Whether counterclaim unproven

The plaintiff's claim against the defendants was for various sums owing under a subcontract to carry out mechanical and electrical works in a building project. The claim included the balance of the agreed contract sum, monies expended for carrying out variation works, release of the retention sum and the refund of deductions that should not have been made. The defendants counterclaimed for liquidated and ascertained damages for the plaintiff's alleged delay in completing the subcontract.

Held, allowing the claim and dismissing the counterclaim, ordering the defendants to pay the plaintiff the balance contract sum of RM1,135,826.38, RM634,914.72 for variation work, RM359,395 being the retention sum and RM77,634.16 being deductions that should not have been made:

(1) The plaintiff had proven that the balance contract sum due to it was RM1,135,826.38. The claim for unauthorised deduction of RM77,634.16 was not refuted by the defendants and was therefore allowed (see paras 10 & 25).

(2) The defendants contended that no variation orders were issued to the plaintiff. However, the evidence showed the carrying out of additional work was issued by the first defendant's consultant and that quotations were submitted, where, in some of them, it had the words 'please proceed according to specifications' and the work on variation order No 13 (A)–(L) was verified by the consultant. The first defendant admitted to ordering work on lighting protection and failed to prove its allegation that the work had not been completed (see paras 11 & 19–20).

(3) Although the requirements of warranty and declaration were not complied with for the release of the retention sum of RM359,395, the fact of the issuance of the certificate of practical completion and the expiry of the defects liability period rendered the non-compliance not fatal to the claim for the release of the sum (see para 23).

(4) As there was no document on defects or notice to rectify defects, it appeared that there were no defects. The allegation of defective work was

not proven and the cost of rectifying defects ought not to have been deducted from the valuation for interim certificate No 25 (see para 28).

(5) The defendants failed to prove any losses they had suffered as a result of the plaintiff's delay (see para 31).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan-defendan adalah untuk pelbagai jumlah yang kena dibayar di bawah subkontrak untuk menjalankan kerja-kerja mekanikal dan elektrik di dalam projek bangunan. Tuntutan tersebut termasuk baki jumlah kontrak yang dipersetujui, wang yang dibelanja untuk menjalankan pelbagai kerja, melepaskan wang tahanan dan memulangkan pemotongan yang tidak patut dibuat. Defendan-defendan menuntut balas untuk ganti rugi tertentu dan ditetapkan untuk dakwaan kelewatan plaintif dalam menyiapkan subkontrak.

Diputuskan, membenarkan tuntutan dan menolak tuntutan balas, memerintah defendan-defendan membayar plaintif baki jumlah kontrak sebanyak RM1,135,826.38, RM634,914.72 untuk kerja pelbagai, RM359,395 sebagai wang tahanan dan RM77,634.16 sebagai pemotongan yang tidak patut dibuat:

(1) Plaintif telah membuktikan bahawa baki jumlah kontrak yang kena dibayar kepadanya adalah RM1,135,826.38. Tuntutan untuk pemotongan yang tidak dibenarkan sebanyak RM77,634.16 tidak disangkalkan oleh defendan-defendan dan oleh itu dibenarkan (lihat perenggan 10 & 25).

(2) Defendan-defendan berhujah bahawa tiada perintah pelbagai dikeluarkan kepada plaintif. Walau bagaiamanpun, keterangan menunjukkan pelaksanaan kerja tambahan dikeluarkan oleh pakar perunding defendan pertama dan bahawa sebut harga diserahkan, di mana, dalam sebahagiannya, ia mempunyai perkataan-perkataan 'please proceed according to specifications' dan kerja atas perintah pelbagai No 13(A)–(L) disahkan oleh pakar perunding. Defendan pertama mengaku mengarah untuk kerja perlindungan pencahayaan dan gagal untuk membuktikan dakwaannya bahawa kerja tidak siap (lihat perenggan 11 & 19–20).

(3) Walaupun kehendak waranti dan perisytiharan tidak dipenuhi dengan perlepasan wang tahanan sejumlah RM359,395, fakta pengeluaran perakuan siap praktikal dan tamatnya tempoh liabiliti kecacatan menyebabkan ketidakpatuhan tersebut tidak serius kepada tuntutan untuk perlepasan jumlah tersebut (lihat perenggan 23).

(4) Memandangkan tidak terdapat dokumen atas kecacatan atau notis untuk membetulkan kecacatan, oleh itu tidak terdapat kecacatan. Dakwaan

kerja cacat tidak dibuktikan dan kos pembetulan kecacatan tidak patut dipotong daripada penilaian untuk perakuan interim No 25 (lihat perenggan 28).

(5) Defendan-defendan gagal untuk membuktikan apa-apa kerugian yang telah dialami mereka akibat kelewatan plaintif (lihat perenggan 31).]

Notes

For a case on M&E fittings, see 3 *Mallal's Digest* (5th Ed, 2015) para 4024.

Cases referred to

Jetera Sdn Bhd v Maju Holdings Sdn Bhd [2007] 3 MLJ 609, CA (refd)
Pembinaan Wasmegah Sdn Bhd v Ecofirst Construction Sdn Bhd [2015] 5 MLJcon 59; [2014] 1 LNS 1038, HC (refd)
RTS Technology Sdn Bhd v Itramas Technology Sdn Bhd [2014] 1 LNS 185, HC (refd)

Mary M Anthony (MM Anthony & Azura) for the plaintiff.
Noor Amran bin Abdul Jalil (Noor Amran & Co) for the defendant.

See Mee Chun J:

INTRODUCTION AND PARTIES

[1] This is the plaintiff's claim arising from a subcontract awarded to it by D1 via letter of award dated 5 March 2006 ('LA') in respect of Mechanical and Electrical Works and Associated Work to design, build and complete Institut Kemahiran Mara (M&E work). The subcontract price for the M&E work was RM7,187,900. D2 was the main contractor appointed by Majlis Amanah Rakyat (MARA) for the entire project and had in turn appointed D1 as its contractor.

CLAIM AGAINST D2

[2] The plaintiff's claim against D2 is founded on D2's involvement in the M&E work and payments it had made to the plaintiff and the plaintiff's subcontractors. As explained by PW1 (Encik Mohd Rosli bin Mohd Rajuli, Director) in Q&A 6 of his witness statement marked as WSP1, there had been letters from D2 to the plaintiff in C 21 and 22 and from plaintiff to D2 in C 24 and 25. D2 had also made payments to the plaintiff as in B1 70, 73, 76, 87, 113, 122, 124 and130. The fact of such payment was confirmed by DW1 (Encik Yusri bin Misiran, Project Manager for D1 and General Manager for D2) in Q&A 17 of his witness statement marked as WSD1 and with specific reference to payment vouchers Nos 9196, 9460, 9466, 9940, 11065, 11066, 11314 and 11551. It was also PW1's evidence D2 had been involved in the

project. D2 had also made a counterclaim against the plaintiff, the particulars of which are pleaded in paras 29–32 of statement of defence and counterclaim. In para 2 of agreed facts it is stated 'D2 via D1 had appointed plaintiff'. Hence although the LA is from D1 to the plaintiff the aforesaid facts and D2's counterclaim point to a contractual relationship between the plaintiff and D2.

THE PLAINTIFF'S CLAIM

[3] The plaintiff's claim consist of the balance sum of RM1,572,116.10 due under the subcontract sum of RM7,187,900, variation work, retention sum and refund of unauthorised deductions. The claim on balance sum was then reduced to RM1,135,526.38 as per para 4 of written reply dated 14 April 2015.

Claim on balance sum

[4] The evidence is that interim certificates are prepared by D1. It was on that basis that payment recommended is paid to the plaintiff. Refer to the evidence of PW1 in his Q&A 16. DW1 in cross-examination to a question '*untuk semua pembayaran*, interim payment, *pihak defendan telah mengeluarkan* certificate to the plaintiff for all the work and payment, agreed?' answered 'Setuju' (p 34, Notes of Proceedings ('NOP') and in p 35, NOP as follows:

> S: Pg 297, 299 its' a cross-refer, I don't want to go through the whole thing, I'll just take one. *En Yusri boleh kita rujuk pada interim payment yang telah dikeluarkan oleh Defendan pada* Plaintiff. This question I will pose to you, you *setuju tak untuk semua pembayaran*, interim payment, *pihak Defenden telah mengeluarkan* certificate to the Plaintiff for all the work and payment, agreed?
>
> *J: Setuju.*

[5] It was PW1's evidence in Q&A 10 that from the subcontract sum of RM7,187,900, RM5,615,783.90 had been paid leaving a balance sum of RM1,572,116.10. DW1 in Q&A 17 said RM2,138.898.07 had been paid to the plaintiff and in Q&A 22 that RM3,476,146.39 had been paid to the plaintiff's subcontractors. This has not been disputed by the plaintiff. According to the plaintiff after taking into account this two deductions what should be due is RM1,572,855.54. From this amount there had been deductions made by the defendant in respect of overtime, electricity, water, kitchen hood and work done by others amounting to RM77,634.16. These deductions have been disputed by the plaintiff and is separately claimed as unauthorised deductions. The plaintiff says after deducting RM77,634.16 what is now due to it ought to be RM1,135.826.38.

[6] Both parties had relied on valuation for interim certificate No 25 (B1 154–159) as the basis for computation. Accordingly the figures in the valuation where relevant to the claim is reproduced below:

VALUATION FOR INTERIM CERTIFICATE NO.25

"Date of Certificate : 27th August 2009 Date of Valuation : 27th August 2009

PROJECT :CADANGAN MEREKABENTUK, MEMBINA DAN MENYIAPKAN INSTITUT KEMAHIRAN MARA DI MUKIM SEROM 4 & 5, DAERAH MUAR, JOHOR DARUL TAKZIM.

Contractor : Casa Tenaga Sdn. Bhd.

Sub Contractor Works: Mechanical & Electrical Works

Date of Possession: 21st March 2006 Date of Completion: 10th September 2007
E.O.T No. 1 :20th January 2008

Contract Sum : RM 7,187,900.00

Retention : 5% from Contract Sum @ RM 359,395.00

ORIGINAL CONTRACT SUM	RM7,187,900.00
Deductions	
a) Retention Fund (Maximum 5%)	RM 359,395.00
b) Previous Payment no. 1-23	RM2,138,898.07
c) Overtime-Appendix D	RM 128.98
d) Electric Bill-Appendix C	RM 32,397.87
e) Water Bill-Appendix E	RM 139.12
f) Material By ESSB and COSH-Appendix A	RM 899,013.55
g) Direct payment to Casa Tenaga Sub Contractor	RM3,476,146.39
h) Payment to Ann Kimpalan –Kitchen Hood	RM 7,900.00
j) Workdone by others	RM 37,197.17
	6,951,216.14"

[7] DW1 stated in Q&A 28 after taking into account the payments made to the plaintiff, its subcontractors and the other deductions of RM1,336,171.69 (consisting of the alleged unauthorised deduction of RM77,634.16, retention sum of RM359,395 and supply of materials of RM899,013.55) the total would be RM6,951,196.15 leaving a balance contract sum of RM236,703.85. In Q&A 32 he explained the final balance contract sum would be RM166,343.25 arrived at after taking into account retention sum, the earlier balance contract sum (RM359,395 + RM236,703.85) minus cost of rectifying defects of RM429,755.60.

[8] The evidence of both parties is that RM2,138.898.07 had been paid to the plaintiff and RM3,476,146.39 paid to the plaintiff's subcontractors. This would leave a balance of RM1,572, 855.54 still due. From this balance there was a further alleged unauthorised deduction of RM77,634.16 which then leaves a balance sum of RM1,135,826.38.

[9] From the pleadings the defendants had only stated the payment of RM3,476,146.39 had not been taken into account; it had not pleaded it had supplied materials worth RM899,013.55 which ought to be taken into account in arriving at the balance contract sum. Hence this item which was deducted from the balance contract sum cannot be considered.

[10] The plaintiff has thus proved the balance contract sum due to it is RM1,135,826.38.

Additional work

[11] The claim for additional work is RM552,028.48 and RM99,200 (lightning protection). The defence in para 19 essentially states the plaintiff had submitted quotations for the work for D1's approval and D1 had only approved work for lightning protection but it had not been completed. It was thus the defendant's contention there were no variation orders issued by D1, no approval from the employer MARA and no evidence of work such as progress report or minutes of meetings.

[12] In this regard there was no formal variation order (VO) issued by D1 as stated by DW1 in Q&A 40. DW1 further explained that as the main contractor it would obtain the VO from MARA and it would then instruct the plaintiff to complete the work as stated in VO. PW1 in his Q&A 21 had detailed their claim with reference to what it termed as the VOs (VO 1–13) and matched the VOs to quotation submitted, instruction given and verification of work in respect of VO 13A-L. In Q&A 22 PW1 explained there was no verification of work done for VO 1-12 due to the frequent change in D1's project manager and it was only when one Mr Suhaili was appointed was this done. So for example for VO 1 'incoming duct at TNB station' the instruction was given in B2 187 and 313; VO 2 'compliance to commented shop drawing by consultant', the instruction was given in B2 183–185 and the quotation submitted in B2 202 by Itmax System Sdn Bhd who is the plaintiff's contractor; and etc. For VO 13A–L, the relevant quotation, instruction and verification were set out. So for example VO 13A 'wiring cable theft' the quotation from Itmax is in B2 222–223, the instruction in B2 324 and the verification in B2 225 by one Riduan bin Ismail Mega Jati's resident engineer (RE) and etc.

[13] In its written reply plaintiff's counsel has thoroughly addressed the matching of VO to the quotation, instruction and verification as can be seen in paras 7.5 (pp 15–17), 7.6 (a)–(c) (pp 15–20) and 7.6 (j)–(l) (p 22).

[14] The defendant's consultant was Mega Jati Consult Sdn Bhd (Mega Jati) and DW1 agreed Mega Jati was D1's agent (p 32 NOP).

[15] Thus the plaintiff has proved the work was instructed by D1 through its agent, Mega Jati. Quotations had been submitted by Itmax which were not denied to have been received either by D1 or Mega Jati. If indeed D1 is now denying the absence of instruction it ought to have rejected the quotations and not remain silent.

[16] Further the quotations submitted by the plaintiff in B2 313–335 also bore a handwritten note 'Please proceed according to specifications' issued by one Hasnol Aidi bin Yahya Electrical Director for Mega Consult as confirmed by DW1. In re-examination DW1 said he had seen B2 313 but without the handwritten note. It was thus submitted the quotations had been tampered with. This is untenable as it was only an allegation without proof.

[17] The work for VO 13(A)–(L) was verified by the RE to Mega Jati.

[18] There is thus documentary evidence for the additional work ordered for a lesser sum as acknowledged by the plaintiff in para 9.2 of written reply.

[19] A similar situation occurred in *Pembinaan Wasmegah Sdn Bhd v Ecofirst Construction Sdn Bhd* [2015] 5 MLJcon 59; [2014] 1 LNS 1038 where it had been contended there were no VOs before the court and it was held the evaluation had been made by the defendant's staff, checked by their witness (DW1) and approved by the defendant's chief executive officer (p 9). In this instant case the work had been instructed by the consultant, quotations submitted where in some of them it had the words 'Please proceed according to specifications' and the work on VO 13 (A)–(L) verified by the consultant too.

[20] The defendant has admitted to ordering work on lighting protection and has failed to prove its allegation the work had not been completed.

[21] Condition 11 only requires the subcontractor to comply with and carry out any variations ordered by the contractor in writing. Although paras 50 and 63 in Appendix J state the approval of MARA is required this is a matter between the defendants and MARA.

Retention sum

[22] On the release of retention sum of RM359,395 it was established the requirements for its release has not been fulfilled. For the first 2.5% it is the declaration (declaration). As explained by PW1 the warranty on product could not be submitted but they had done the rectification and the statutory declaration is to state there are no further claims by the contractor and subcontractor. DW1 stated the declaration is also to state defects have been rectified and the consultant must confirm it.

[23] As there is still a claim on balance sum due it would not be possible for the plaintiff to issue a declaration there is no outstanding claim as for all intent and purpose there is an outstanding claim. On the declaration to state defects have been rectified and to be confirmed by the consultant, there was no notice issued to the plaintiff to rectify defects. C22 which was referred to by DW1 as a notice of defects did not make any reference to defects. In this regard CPC was issued on 4 November 2009 (B2 163) wherein it is stated the defects liability period (DLP) would be from 4 November 2009–3 November 2012. Hence although the requirements of warranty and declaration have not been complied with the fact of issuance of CPC and expiry of DLP renders the non compliance not fatal to the claim for its release.

[24] In *RTS Technology Sdn Bhd v Itramas Technology Sdn Bhd* [2014] 1 LNS 185 the court had occasion in p 46 to refer to *Jetera Sdn Bhd v Maju Holdings Sdn Bhd* [2007] 3 MLJ 609 where the claim for release of retention sum was allowed as DLP had expired and defective works had been rectified.

Unauthorised deduction

[25] The claim for unauthorised deduction of RM77,634.16 has been explained by PW1 in Q&A 13–20 and has not been refuted by the defendant. This claim is therefore allowed.

DEFECTIVE WORK

[26] In Q&A 29 DW1 stated there were defects to the work done by the plaintiff and that the plaintiff knows of the defects as PW1 attended a meeting pertaining to defects. As to whether there are any documents informing the plaintiff of the defects and the plaintiff is required to make good, he referred to C22 which is a letter dated 21 April 2010 addressed to the plaintiff and others. That letter referred to a *Mesyuarat Lawatan Pemeriksaan Kecacatan* held on 8 April 2010 and according to DW1 *'maksudnya dia orang* aware of this' (p 25 NOP). He did agree there was nothing in the letter about defects when he was asked 'Anything *pasal* defect' and his answer was 'Tidak' (p 26 NOP). DW1 also agreed that cl 20 of LA requires the defendants to issue a written notice to the plaintiff and if the plaintiff does not rectify then the defendants can appoint others to rectify. He does not recall whether there was such a notice issued by the defendants.

[27] Clause 20 requires the plaintiff to rectify defects within DLP. The relevant subparagraph referred to DW1 is as follows:

> ... If the sub-contractor shall fail to carry out such work within seven (7) days after receipt of a written notice from the contractor requiring the sub- contractor to carry out such work during the period prescribed in the foregoing paragraph, the

A contractor shall be entitled to carry out such work itself or appoint other contractors to carry out such work and all costs, losses and / or damages incurred or suffered by the contractor as a result of such failure shall be borne by the sub-contractor and may be deducted from any money due or which may become due to the sub-contractor ...

B

[28] As there was no document on defects and notice to rectify defects it would appear there were no defects. The allegation of defective work was thus not proven and the cost of rectifying defects ought not to have been deducted from the valuation for interim certificate No 25.

C

COUNTER-CLAIM

[29] In paras 30 and 31 of statement of defence and counterclaim, the defendants stated the completion date of 29 January 2007 was extended upon the plaintiff's request to 2 Februaray 2008 wherein the plaintiff failed to complete the work. D1 only handed over the project to D2 on 4 November 2009. The plaintiff is thus liable to pay liquidated and ascertained damages (LAD) calculated from 3 February 2008–4 November 2009 at a daily rate of RM1,800 for 641 days making it a total of RM756,380.

D

E

[30] As per Appendix J to LA, item 35 states LAD of RM1,800 per day may be imposed on plaintiff for each day of delay. CPC was issued effective from 4 November 2009. Although the counterclaim and DW1's evidence state EOT was granted until 2 February 2008, a perusal of EOT No 3 (B2 307–308) shows it to granted until 15 March 2009. No explanation was given for this discrepancy. Hence if the plaintiff is to be liable for LAD it should be computed from 16 March 2009 and not from 3 February 2008.

F

G

[31] DW1 had further stated D1 had to bear the cost of delay and MARA had imposed LAD on the defendants. This was however only a bare assertion and there was no proof that MARA had imposed any LAD. DW1 had agreed in the letters for EOT nothing was indicated about the imposition of LAD. The defendants had therefore not proven any losses suffered as a result of the delay.

H

CONCLUSION

I

[32] The plaintiff's claim for a balance sum of RM1,135,826.38, variation work of RM634,914.72, retention sum of RM359,395, unauthorised deduction of RM77,634.16 and interest of 5% from date of writ to date of final settlement is allowed. The defendant's counterclaim is dismissed. Costs to plaintiff.

Claim allowed and counterclaim dismissed, the defendants ordered to pay the plaintiff the balance contract sum of RM1,135,826.38, RM634,914.72 for variation work, RM359,395 being the retention sum and RM77,634.16 being deductions that should not have been made.

Reported by Ashok Kumar